Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/39418/2014
IA/39419/2014
IA/39422/2014
IA/39427/2014
IA/39437/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th August 2015	**On 18th August 2015**
Prepared on 11th August 2015	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MS NANA YAA ADUMEA ADADE	**1st Appellant**
MR LAWRENCE BOATENG	**2nd Appellant**
K	**3rd Appellant**
M	**4th Appellant**
J	**5th Appellant**

(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J. Wells, Solicitor
For the Respondent: Mr S. Walker, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The Appellants in this case are all citizens of Ghana. They appeal against the decision of Judge of the First Tier Tribunal O'Hagan sitting at Birmingham on 12th of December 2014 who dismissed their appeals against the Respondent's decisions made on 16 September 2014. The Respondent's decisions were to refuse each of the Appellants' applications for leave to remain and to remove them from the United Kingdom. The first Appellant (who I shall refer to as the Appellant) and who was born on 11 August 1977 is the wife of the 2nd Appellant born on 5th of July 1978 and the mother of the 3rd, 4th and 5th Appellants. Her husband the 2nd Appellant is the father of the 3rd, 4th and 5th Appellants who were born in the United Kingdom on the 9th of May 2005, 12th of December 2010 and 5th of June 2013 respectively. The 3rd Appellant is thus 10 years of age and I will refer to him as K.

2. The Appellant entered the United Kingdom in 2000 having been granted entry clearance as a visitor from 25th of September 2000 until 25th of March 2001. She did not return to Ghana when her leave as a visitor expired but remained in the United Kingdom. At some point in 2004 she met the 2nd Appellant in this country and in late 2004 returned to Ghana. She had by then entered into a relationship with the 2nd Appellant and was pregnant with the couple's first child. She wished to obtain the blessing of her family in Ghana for her relationship with the 2nd Appellant. Whilst in Ghana she applied for and obtained entry clearance to enter the United Kingdom once more as a visitor. This was granted valid from 27th of January 2005 until 27th of January 2006. She entered the United Kingdom on the 7th of February 2005 and has remained in this country ever since.

3. The 2nd Appellant entered the United Kingdom in April 2004 having been granted entry clearance as a visitor valid from 7th of April 2004 until October 2004. The Appellant separated from the 2nd Appellant in 2011 following difficulties in their relationship. In February 2012 the Appellant made an application for a residence card under the Immigration (European Economic Area) Regulations 2006 on the basis that she was the spouse of a man called Kofi Alessou. She married Mr Alessou by way of a Ghanaian proxy marriage. The Appellant's application for a residence card was refused in August 2012 by the Respondent because she did not accept the proxy marriage declaration as genuine proof of marriage. The relationship between the Appellant and Mr Alessou broke down shortly thereafter and the Appellant and 2nd Appellant had a reconciliation.

The Proceedings

4. On 16th of October 2013 the Appellants solicitors wrote to the Respondent making an application for further leave to remain on the grounds that the Appellants had established a private and family life in the United Kingdom pursuant to Article 8 of the European Convention of Human Rights (respect for private and family life) outside and as

contained within the immigration rules. The Respondent refused these applications on 14th of December 2013 with no right of appeal. On 14th of January 2014 the solicitors wrote to the Respondent inviting her to review that decision. On 23rd of January 2014 the Respondent replied conceding that section 55 of the Borders, Citizenship and Immigration Act 2009 should have been considered when refusing the application and that as a result the refusal would be reconsidered within a period of 3 months. That period elapsed without a fresh decision and a reminder letter was sent by the solicitors on 26th of June 2014. This finally resulted in the substantive refusal dated 16th of September 2014 which considered the Appellants applications under Article 8 taking into account section 55 and the immigration rules put in place on 9th of July 2012. A one-stop warning was attached to the decision. It was the Appellant's appeal against the decisions of 16th of September 2014 that has given rise to the present proceedings.

5. The Respondent refused the applications under appendix FM of the immigration rules as neither the Appellant nor the 2nd Appellant could fulfil the requirements of being a British citizen present and settled in the United Kingdom. There were not considered to be any insurmountable obstacles to the Appellant and the 2nd Appellant returning to Ghana as they were both nationals and held identity documents for that country. They were a healthy couple aged 37 and 46 years of age respectively and the family would be removed as a whole. The Appellants appealed that decision arguing that it was unduly harsh and not in accordance with the law.

The Determination at First Instance

6. The Judge set out his analysis, findings and conclusions at paragraphs 33 to 53 of the determination. He did not find either the Appellant or the 2nd Appellant to be credible witnesses. The Appellant had worked illegally and the Judge found that they had lied to him about when the Appellant had last worked. The two adult Appellants were "worryingly vague and evasive" about their own financial affairs. The Judge found that the family was receiving money about which the Appellant had failed to give a full and candid account. There was evidence of past dishonesty on the part of the Appellant in relation to her immigration affairs. The Appellant had returned to the United Kingdom in 2005 using a visitor's visa which was obtained on the basis of false representations that she intended to return to Ghana when she did not.

7. As I have indicated there were 3 child Appellants to this appeal the oldest of whom K was 9 years old at the date of the hearing before the first-tier Judge and is now 10 years of age. The other 2 children were at the date of hearing and are still, under the age of 7. It was argued at first instance that K could bring himself within the provisions of paragraph 276 ADE of the immigration rules as he was under the age of 18 years and had lived

continuously in the United Kingdom for at least 7 years and it would not be reasonable to expect him to leave the United Kingdom. At paragraph 37 of the determination the Judge wrote: "there are I recognise significant factors to support the argument that it would not be reasonable to expect K to leave the United Kingdom. He has lived here all of his life and this is the only country that he has ever known. I accepted that he would have formed friendships and achieve that degree of integration into school and his wider community that one would expect of any child of his age. However there were also weighty countervailing factors. In particular K is still of an age where the main focus of his life lies with his parents and siblings. For a child of his age, it may well not be the only focus, but it will be the main focus.... I was satisfied that K's best interests lay with his parents and siblings".

8. The Judge noted that the family as a whole would be returning to the country of K's parents' birth where they were familiar with the culture and society. There would not be significant linguistic difficulties since English was spoken in Ghana alongside indigenous languages. There were family members in Ghana in the form of the maternal grandparents. K had spoken to his maternal grandmother by telephone. He could be removed to Ghana without serious detriment to his well-being. Although his removal would be detrimental to his education the Judge cited the case of **EV Philippines [2014] EWCA Civ 874** that the desirability of being educated at public expense in the United Kingdom could not outweigh the benefit to children of remaining with their parents. Just as the United Kingdom could not provide medical treatment to the world so it could not educate the world. Furthermore there were no significant obstacles to the reintegration of the Appellant and the 2nd Appellant back into Ghana.

9. The Judge considered whether the Appellants could benefit from paragraph EX. 1 of appendix FM. EX. 1 was not a freestanding provision (see the case of **Sabir [2014] UKUT 00063**). Insurmountable obstacles meant very significant difficulties which would be faced by a member of the family continuing their family life outside the United Kingdom but that was not the case here. The family could not succeed within the immigration rules the issue therefore was whether they could succeed outside the immigration rules under Article 8. The Judge directed himself in accordance with the step-by-step approach required by the case of **Razgar [2004] UKHL 27** and at paragraph 52 set out his conclusions.

10. The Judge took into account the Appellant and 2nd Appellant's violations of immigration laws and reminded himself of the provisions of section 55 in the guidance given in **ZH (Tanzania) [2011] UKSC 4** by the Supreme Court. Whilst the welfare of a child was a primary consideration it was not the paramount consideration and certainly not a trump card that overrode all other considerations. The impact on the 2 younger children

would be relatively slight because their engagement with the world outside of their family was relatively nascent. The Judge acknowledged at paragraph 52 (3) that it was a more potent factor in the case of K. However for the reasons that he had already set out above (which I have summarised above at paragraph 7) he did not consider the decision to be an unreasonable one in K's case and did not consider that K's interest in remaining in the United Kingdom to pursue his education and to maintain the social ties that he had formed was sufficient to outweigh the other considerations in the Respondent's favour. The Judge described as unattractive the argument that the Appellant and 2nd Appellant should benefit from their prolonged unlawful and precarious residence in this country by being allowed to remain because of the impact of their actions on their children. He dismissed the appeal.

The Onward Appeal

11. The Appellants appealed against that decision arguing that there had been no full and proper assessment of K's best interests under section 55 in particular his wish to remain in the United Kingdom. He would be entitled to be registered as a British citizen on the 9th of May 2015 on account of his residence in the United Kingdom for the first 10 years of his life. He spoke fluent English and considered himself to be British. He had family ties in the United Kingdom. There was not the support network available in Ghana which the Judge had indicated because the K's maternal grandparents had extensive health problems of their own. K had learning needs and required educational support. There was a public interest in favour of permitting him to settle after seven years as resources had gone into his education and welfare.

12. The application for permission to appeal came before Judge of the First-Tier Tribunal Hollingworth on the papers on 20th February 2015. In granting permission to appeal he wrote that an arguable error of law had arisen in relation to the extent of the analysis by the Judge as to the available evidence in respect of K. This included “the relationship between the factors identified and those factors not specifically referred to on the basis of the available evidence”.

13. The Respondent submitted a reply to the grant of permission pursuant to rule 24 on 23rd of March 2015. The Respondent argued that it was not necessary for the First-Tier Tribunal Judge to identify and explain every factor in his determination. He had given full consideration to K's age and its impact upon the reasonableness test inherent in paragraph 276 ADE and section 117B (6) of the Nationality Immigration and Asylum Act 2002. There had been a full **Razgar** analysis and exhaustive section 55 and proportionality considerations.

The Hearing before Me

14. In consequence of the grant of permission the matter came before me to determine whether in the first place there was an error of law in the Judge's determination such that it fell to be set aside. If there was then the matter would have to be reheard. If there was not then the decision at first instance would stand.

15. The Appellant's solicitor relied on his skeleton argument (supplemented by some observations) which quoted from a statement of compatibility made by the Respondent at the time that the immigration rules contained in Appendix FM and paragraph 276 ADE were introduced in July 2012. There was subsequently an amendment made to paragraph 276 ADE to introduce the additional criterion that to succeed under the paragraph it had to be shown that it was unreasonable to expect the child in question to leave the United Kingdom. The skeleton argument submitted that the Respondent had given no consideration to the effect of the decision to remove K other than to say in a simple somewhat simplistic way that as K's parents and younger siblings could be removed it was reasonable that K also was removed.

16. The Judge's consideration of the duty imposed by section 55 was similarly flawed for the same reasons. K had not chosen to come to United Kingdom he was born here. The key decisions were taken by his parents. The Judge had not placed K's length of residence at the centre of his consideration. Nor was it considered other than in passing that the length of residence fell only a few months short of the 10 year threshold which would have enabled K to apply for United Kingdom citizenship. He had crossed the seven-year threshold and was within reaching distance of the 10 year threshold. The focus of the Judge's consideration was on the Appellant and 2nd Appellant as could be seen by the closing observation that the Appellant's argument that they should remain in this country because of the impact on the children was an unattractive one.

17. In oral submissions the solicitor argued that the none of the children had ever been to their parents home country and the Judge had failed to recognise the sliding scale of importance attached to long residence of a child. The Presenting Officer submitted that the Judge’s conclusions were open to him on the facts of the case.

Findings

18. The focus in this appeal was on the impact upon the 3rd Appellant K of the family's removal to Ghana. It was not argued before me that the Judge's reasoning in relation to the adults was legally flawed. The case rests entirely on their argument that it is unreasonable to expect K to leave the United Kingdom and since it is unreasonable (as even the Judge at first instance had found) that K should be left here on his own whilst the others returned to Ghana they should be allowed to remain here. The

issue before the Judge was the proportionality of the interference with K's private and family life and the family life of the other Appellants.

19. The Judge was dealing with a case where none of the Appellants could bring themselves within the immigration rules. The two adults had long since overstayed their visitors' visas and none of the children had acquired British citizenship. It was argued on the Appellant's behalf that K was very close to being entitled to United Kingdom citizenship by reason of the length of time he had been in this country. However the plain fact of the matter is that he had not acquired 10 years residence in this country at the date of the hearing (with which I am concerned). Even if the decision to remove him on 17 September 2014 did not stop the clock from running in relation to the acquisition of British citizenship as at the date of hearing K was not entitled to that citizenship. The Appellant's argument therefore in this respect is a near miss argument which cannot succeed.

20. What the Appellants can show is that K has lived in this country for more than seven years and is therefore a qualifying child for the purposes of section 117C of the 2002 Act. Under section 117B(6) the public interest in maintaining immigration control is not met where it is unreasonable to expect a qualifying child to leave the United Kingdom. In effect the test under paragraph 276 ADE as amended and the provisions of section 117 B (6) are the same. The Judge considered the issue under 276 ADE and I have quoted the relevant parts of his consideration above (see paragraph 7). It was a matter for the Judge on the basis of the evidence before him to determine the proportionality or otherwise of the interference with the Appellant's family life and the reasonableness or otherwise of expecting a child to return to the country of which he is a citizen. The Judge gave cogent reasons for his conclusion that it was reasonable to expect K to return with his parents to Ghana. To argue that the Judge did not give sufficient consideration to the length of time spent by K in this country and/or his education is a mere disagreement with the result. The Judge accepted that there were significant factors which weighed on the Appellant's side of the scale is but also acknowledged that there were weighty countervailing factors. The Judge's analysis under the immigration rules paragraph 276 ADE applied equally to the proportionality consideration outside the immigration rules in the light of the statute.

21. As well as criticising the Judge's treatment of the issue of the welfare of the children the Appellants also criticised the Respondent's consideration of the issue. The refusal letter dated 16th of September 2014 is a lengthy one in which the Respondent directs herself as to her duty under section 55 and notes there would be nothing to prevent the three children and their father from relocating to live with the Appellant in Ghana. It is specifically noted that K was enrolled in school but he was of an age

young enough to be able to adapt upon relocation to Ghana with his parents. Country background information about the educational system in Ghana was then set out in the refusal letter and it was noted that K would be able to enter the education system in Ghana whilst the Appellant and the 2nd Appellant provided financial support to their family. It cannot be argued in my view that the Respondent has failed to consider her duty under section 55 in relation to K. This point too is a mere disagreement with the result.

22. It is correct to say that the Judge was concerned about the adult Appellants' poor immigration history. The Judge had to consider the impact of the Respondent's decision on each member of the family. It is also reasonable to say that a child should not be punished for the sins of his parents. In finding the adult Appellants' argument that they should be allowed to remain because of the impact on the children to be unattractive; the Judge was criticising the adult Appellants' attitude towards immigration rules and their disregard of those rules. The Judge made it clear that the argument had been put on behalf of the adult Appellants and he was dealing with it on that basis not as part of his consideration of K's best interests.

23. The Judge was entitled to draw the conclusions that he did on the best interests of the children. It is clear from the structure of the determination that the Judge very much had the best interests of the children generally and K in particular in the forefront of his mind. He was aware that the welfare of the children was a primary consideration and had to be considered first. He dealt with the issue under paragraph 276 ADE at the beginning of his conclusions but as I have indicated his conclusions applied equally when considering the matter outside the Rules at which point the section 117B(6) provisions applied. I do not consider therefore that there was any error of law in this case. The Judge made findings which were open to him on the evidence and he considered the welfare of the children adequately at the date of hearing. As the Respondent pointed out in the Rule 24 reply, it was not necessary for the Judge to identify each and every piece of evidence that was put before him. The Judge gave cogent reasons for his conclusions satisfying the test that the losing party should reasonably be expected to understand from the judgment why they have lost. I should add for the sake of completeness that even if K is now entitled to apply for British citizenship the effect on the Appellants' position would be a separate matter to be determined at some future date.

Notice of Decision

The decision of the First-Tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellants' appeals.

Appeals dismissed

I make no anonymity order as there is no public policy reason for so doing.

Dated this 14th day of August 2015

.....
Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As no fee was payable and the appeals have been dismissed there can be no fee award in this case.

Dated this 14th day of August 2015

.....
Deputy Upper Tribunal Judge Woodcraft